SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

Nos. 818, 820, 822, 824

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER, ETC.,

Petitioner,

versus

AMERICAN BARGE LINE COMPANY, MISSISSIPPI BARGE LINE AND UNION BARGE LINE CORPORATION,

Respondents.

(CONSOLIDATED).

Nos. 819, 821, 823, 825, 826

GEORGE MONTGOMERY, STATE TAX COLLECTOR, ETC.,

Petitioner,

versus

AMERICAN BARGE LINE COMPANY, MISSISSIPPI BARGE LINE AND UNION BARGE LINE CORPORATION,

Respondents.

(CONSOLIDATED).

OPPOSITION TO GRANTING WRIT OF CERTIORARI.

ARTHUR A. MORENO,
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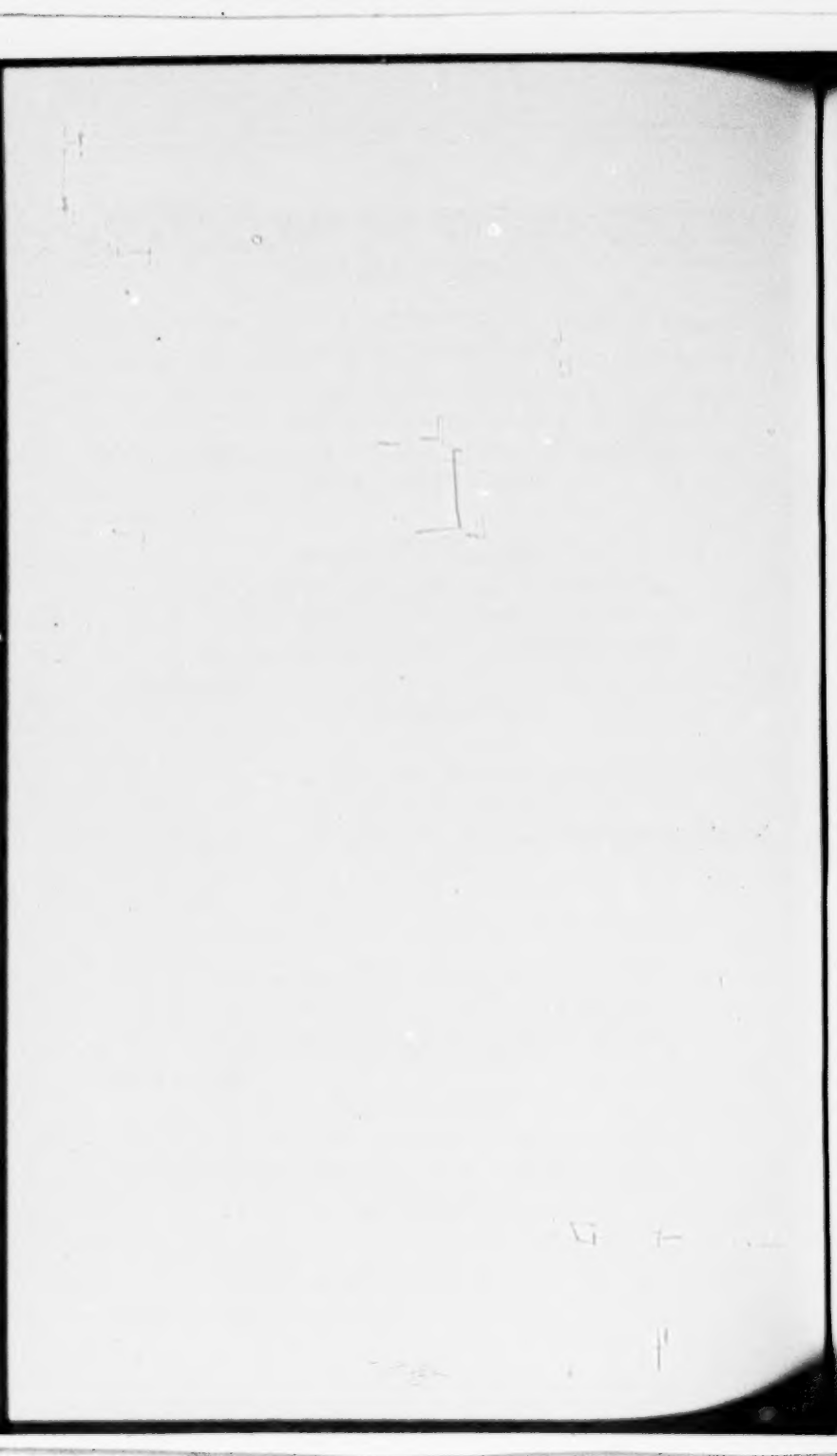

INDEX.

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May It Please the Court:

The decision of the United States Circuit Court of Appeals (Fifth Circuit) did not turn upon a question of

law, but turned upon a question of fact. The fact decided by the court was that the floating equipment of the three respondents did not have a taxing situs in the State of Louisiana, and, consequently, the State of Louisiana and its agencies were without power to tax. The court clearly stated the issue in the following words:

> "The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there".

The court further found that the water equipment of the three respondents came into Louisiana in connection with interstate commerce and remained there only long enough to accomplish the purposes of such commerce. The court further said, with reference to the three respondents, as distinct from the DeBardeleben Coal Corporation, the fourth appellee, the following:

> "The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. These turnarounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered

by the interstate commerce operations in 1943, American's towboats spent about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spent about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944, Union's towboats spent about 2.2% and its barges about 4.3%".

The Court of Appeals further said:

"The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans".

The court then reviewed a number of cases and said:

"Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquired no tax situs in Louisiana, and that no tax could be legally assessed and collected by that State or by the City of New Orleans".

That the court based its decision on a question of fact must be clear from the recitation of what the Court of Appeals said. The conviction that the case turned upon a question of fact, and not upon a denial of principles of law, asserted by the petitioners here, is re-enforced by the fact that the court found that the property of the DeBar-

deleben Coal Corporation did have a taxing situs in the City of New Orleans. It did not deny to the petitioners the application of the principles for which they contended, but, on the contrary, upheld the assessment made by the Louisiana Tax Commission on a proportionate basis, which assessed to the DeBardeleben Coal Corporation 25% of the value of all its watercraft. However, the United States District Court found, and the United States Circuit Court of Appeals affirmed the finding that, in the assessment, had been included barges in Alabama which had never been within the taxing jurisdiction of the State of Louisiana. If the court had denied to the petitioners the application of the principles for which they contended, it would have decided against the petitioners in favor of the DeBardeleben Coal Corporation, but, instead of so deciding, it remanded the DeBardeleben Coal Corporation case to the United States District Court to correct the assessment by the excision of the value of the barges in Alabama. It must, therefore, be clear that these cases turned upon questions of fact. In the case of the respondents here, the facts of no taxing situs were found in favor of the respondents. In the DeBardeleben Coal Corporation case, the court found in favor of the petitioners and held, as a matter of fact, that the property of the DeBardeleben Coal Corporation did have a taxing situs in Louisiana. It impliedly sustained the method of assessment as to the equipment with taxing situs in Louisiana, but remanded the case only to eliminate barges in Alabama and never in Louisiana.

In the questions said to be presented for decision here, it is said that one of the questions is:

> "Whether there is a need to establish a permanent tax situs, as such, of movable property engaged as an entity in interstate commerce, which operates constantly and regularly within the State of Louisiana, in order to entitle the State to its share to these taxes in proportion to the mileage of such watercraft within and without the State identically as allowed in the case of the rolling stock of railroads and on the equipment of other types of transportation companies engaged in interstate commerce".

We take sharp issue with the basis of fact which underlies the suggested question. There is nothing in the record which says that the property which is taxed "operates constantly and regularly within the State of Louisiana". The record clearly shows that these towboats and barges come to New Orleans at irregular intervals and some may come often, while others come infrequently. Unquestionably, had the court found as a fact that any towboat or any barge operated "constantly and regularly within the State of Louisiana", it would have found that such towboat or such barge or barges had acquired a taxing situs in the State of Louisiana. Upon a correct appreciation of the record, the court did not find as a fact that which is stated as a fact as the basis of the question.

It is asked as to why the State of Louisiana is not entitled "to its share to these taxes in proportion to the

mileage of such watercraft within and without the State". The destructive answer to this question is that the assessment was not based upon a mileage schedule traveled within and without the State of Louisiana, but was based upon the conception of fairness of the Chairman of the Louisiana Tax Commission. When asked on what basis he allocated a proportion of the total value of the property of these respondents to Louisiana for tax purposes, he answered:

> "I would have to answer that it is purely an arbitrary figure because we failed to get the information from the taxpayer".

He further said:

> "Well, I could not say we made our assessment on a mileage basis, we are trying to ascertain what property the Mississippi Valley Barge Line Company owned and then it appears from the record here that we estimated a value on all of their holdings and then made an arbitrary assessed value".

He further said that:

> " * * * did ascertain that they owned considerable watercraft and made an arbitrary assessment on the information that we received outside of the report that was made".
>
> * * * * * * *
>
> "I am not in a position to say it was a mileage basis, it was only an arbitrary estimated value because we failed to get any further information".

That the assessment was not made on a mileage basis, but was made on a time basis is shown by his testimony. When asked how he arrived at the 25% proportion which was adopted, he said:

> "Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana".

He was asked:

"Q. Do you know any definite basis for the adoption for 25% any more than 50% or 10%?

"A. No, sir".

The other members of the Louisiana Tax Commission testified substantially as has the Chairman of the Louisiana Tax Commission. There is not a single word in the transcript which shows that the Louisiana Tax Commission knew the mileage traveled by this equipment within the State and without the State, and, consequently, it had no basis for the proportionate system of taxation for which petitioners contend.

The question is propounded:

> "Whether, if such a tax situs must be established to allow a State to tax, there has not been established a tax situs as to that average number of this watercraft which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation".

No where did the trial court, nor the Circuit Court of Appeals find that there was an average number of watercraft belonging to the respondents which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation. If the court had found that there was such an average number of watercraft of the respondents in Louisiana every day, it would have done so in defiance of the evidence. There is no single word in the transcript which would support the statement of an average number of watercraft in New Orleans, or in Louisiana every day of the year.

Equally, there is nothing in the transcript to show any integrated system of transportation, such as a railroad, laid upon rails, with definite and ascertainable termini. The evidence shows a transportation system using towboats and barges. Each towboat and each barge is an entity. Each has an individual value, and, in most cases, each differs from the others. One barge is not related to another barge, and one towboat is not related to another towboat. There is nothing to suggest an integrated system, but only facts to sustain the conclusion that different barges and different towboats, unrelated to each other, are used as a means of transportation. To designate such a system as "integrated" is to overlook the principle of integration announced by this court in other cases. A system is integrated when each part has a definite relationship to each other part, so that one part gives value to other parts. The poles which support the telegraphic wires of a railroad are just as necessary to the operation of the trains as the rails upon which they roll. One cannot be used without the other, and so each gives value to the other.

Each barge of the respondents could be used without relationship to any other barge. The mere fact that they are placed in tows does not make them a part of an integrated system. This is more particularly true as these barges are used indiscriminately and indifferently whenever the needs of transportation require. No two barges are always in the same tow, but a barge may start at one point and be taken out of the tow and not returned in a tow with the same barges throughout the year. The theory of integration asserted here fails because of the absence of the facts of integration.

It is sought to assimilate to this case the principle of *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18. If the principle of that case were applicable to the assessment of the property in this case, the method employed here is wholly different from the method employed in the cited case. The court, in upholding the system of assessment by Pennsylvania, said:

> "The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which ran cars within the state borne to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock and no more. The validity of this mode of apportioning such a tax is sustained

by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States".

In that case, there was a definite basis for the assessment. The measure of the entire tax on the property of the corporation was the capital stock of the company. The entire mileage of the company was taken and the tax was based upon the ratio of mileage to the capital stock. There were two definite and determined factors for making the assessment. In this case, there was no fact of taxation upon which the assessment was based, but the assessment was made on an arbitrary conception of fairness by the Chairman of the Louisiana Tax Commission. He allocated to Louisiana a percentage of the entire value of the property of the respondents, but knew of no reason for his selection of the percentage, except his desire to be fair to other states by leaving to other states 75% of the value of the property. If the court should uphold such a system of taxation, each state, by the selection of what it considered fair to itself, could make arbitrary and conflicting assessments. Unlike the case of *Pullman's Palace Car Company v. Pennsylvania*, each state would select its own factors of value and a percentage which it believed to be fair. In the *Pullman's Palace Car Company* case, there was a definite basis of assessment, which bound all states, so that the aggregate of the assessments could never exceed 100% of the value. If the method employed by the

Louisiana Tax Commission were upheld, each state, by the arbitrary selection of its own percentage, might create an aggregate of assessment which would be confiscatory.

The case of *Marye v. Baltimore & Ohio Railroad Company*, 127 U. S. 117, 8 S. Ct. 1037, is quoted to the effect that where property is found in a taxing jurisdiction, a tax may be constitutionally applied. No one disputes the correctness of the principle, nor denies its application to proper cases. The mere fact, however, that transportation facilities are brought into a state temporarily in connection with interstate commerce, does not subject them to the taxing power of the state. It is undeniable that in the cases at bar the water equipment of the respondents came into the State of Louisiana for purposes directly connected with interstate commerce, and when such purposes had been served, departed promptly. In each of the cases, the testimony shows that it was to the advantage of the owners of this equipment to unload the barges as promptly as possible, to reload them and to depart for other destinations as quickly as possible. Towboats and barges have an earning capacity, based upon day by day activity, and, consequently, neither the towboats nor the barges were permitted to remain in Louisiana any longer than dictated by the business needs of the owners. Unlike the railroad cars, or the average number of cars taxed in the *Pullman's Palace Car Company* case, they did not acquire a factual situs by remaining sufficiently long to fulfill the concept of a taxing situs.

It is argued, without the support of the record, that there is, or was, an average number of barges in Lou-

isiana every day of the year. The statement finds no support in the recorded facts and even if there had been an average number of towboats and an average number of barges in Louisiana every day of the year, there is not a single word of evidence to support the conclusion that an average number of towboats and an average number of barges were taxed. The most that the evidence shows is that, reaching into thin air, the Louisiana Tax Commission assessed the property of the respondents by taking the value of the entire fleet, and then allocating a percentage of this value for assessment purposes for taxation in Louisiana. The members of the Louisiana Tax Commission had to concede that the assessment was arbitrary and is bottomed upon no fact to which they could point which would constitutionally support an assessment.

The statement that:

> "Obviously, then, Louisiana is the permanent situs for this average number of watercraft within its borders constantly",

finds no support in the evidence and rests upon no principle of taxation. Equally, the statement that these barge lines run over fixed routes on inland waterways challenges the facts found in the transcript. While it is true that in certain cases they run between two distant cities, yet, they do not run regularly over any fixed routes, because they go on these waterways wherever cargo requires transportation. No where in the record is there a single fact to establish the mileage over which this equipment travels, nor is there anything in the transcript to show that, like a railroad, the number of miles is constant yearly. On the

contrary, the testimony is that these towboats and barges go on these waterways wherever cargo is available, but they do not travel, day by day, over fixed routes, with a constant mileage. It would tax the ingenuity of the most imaginative to show in this record a single word showing the number of miles over which the watercraft of any of these respondents traveled.

In the reasons for the issuance of the writ, it is said that the Circuit Court of Appeals, as the basis for its decision, states:

> "But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways".

From this excerpt, it is impliedly argued that the Court of Appeals denied the validity of the contention of the petitioners that apportionment is the proper principle of assessment for watercraft. We respectfully say that while this appears in the decision, the Court of Appeals clearly held, in no uncertain terms "that the tugboats and barges of Mississippi, American and Union acquired no taxing situs in Louisiana". Since this watercraft had no taxing situs in Louisiana, it could not be taxed according to any method of taxation, whether upon the apportionment theory, or upon any other theory. If it constitutionally was not subject to taxation, it could not be made so by the selection of a method of assessment. The Court of Appeals, therefore, was neither called upon to decide, nor did it decide, as to these respondents, the question of the validity of the apportionment theory, since it held that

upon no theory of assessment could the property of the respondents be assessed because of the fact that it had no taxing situs in Louisiana. As to the DeBardeleben Coal Corporation it impliedly upheld the validity of the apportionment principle of assessment.

It is fallaciously stated:

> "Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation".

It is fundamental that before property can be taxed, it must have a taxing situs. The taxing system is wholly different from the fundamental need of situs. If property does not have a situs in a state, it cannot be taxed, and the inventive genius of taxing officers in choosing a method of taxation cannot constitutionally subject property having no taxing situs to taxation, because of the choice of methods. Since the Court of Appeals found that these respondents had not factual situs for taxation in Louisiana, the question of method became irrevelant since there was no property upon which the system could operate.

The statement that "the Circuit Court of Appeals incorrectly applied the law of situs", is not supported by any principle or decided case. It rests upon a mere *ipsi dixit* of counsel for the petitioners, and upon no fact in the record. The principles governing the decision as to the situs of watercraft are found in the various cases cited by the Court of Appeals. These principles have been sanctioned by long years of recognition and by an unchanged

jurisprudence. They find recognition in the decision of *Northwest Airlines, Inc., v. Minnesota*, 322 U. S. 292. It is argued that while these principles are applicable to steamships, they are not applicable to towboats and barges. No ground of distinction is stated by the petitioners, nor any principles of law cited in support of the bald statement. The argument seems to rest upon the theory that if Delaware, the charter state of two of the respondents, and Pennsylvania, the charter state of the other respondents, do not tax this equipment, that, automatically, there is conferred upon Louisiana, and other states, a power of taxation, regardless of the fact that such water equipment does not have a factual situs for taxation in these other states. While the implication of the argument may be denied, the conclusion yet remains that the contention is that this equipment must be taxed, and since it must be taxed, Louisiana has the power of taxation, regardless of the fact that it is neither the charter state nor the state where the watercraft has an actual taxing situs. The destruction of the argument lies in its mere statement.

In conclusion, we respectfully say that the Court of Appeal did not deny the contention urged by the petitioners in support of the validity of the assessment, and the constitutional power of Louisiana to exact the tax. What it found in each of these cases was that the towboats and barges came to Louisiana in connection with interstate commerce and remained but a small portion of the time, measured by the need of unloading and loading the barges, and that as soon as those essential facts of interstate commerce had been effectuated, the equipment departed for other ports. In the case of the DeBardeleben

Coal Corporation, it found a different factual situation, and notwithstanding the DeBardeleben Coal Corporation is a Delaware corporation, it held that its towboats and barges exclusive of those in Alabama, had a taxing situs in Louisiana, and so upheld the power of taxation of the State of Louisiana. It, however, did not decide that the system of taxation employed by the Louisiana Tax Commission was improper, because it was never called upon to make that decision since it found that, under no system of assessment, could the property of these respondents be taxed since Louisiana was not the charter state, nor the state where the property, because of its relative permanence in the state, had acquired a taxing situs. The decision of the Court of Appeals is in harmony with the jurisprudence of this Court, so that the application for the writ should be denied.

Respectfully submitted,

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